NO. 48278-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KENNETH FLYTE, as Personal Representative of THE ESTATE OF KATHRYN FLYTE, on behalf of their son JACOB FLYTE, and as personal representative of THE ESTATE OF ABBIGAIL FLYTE,

Respondents & Cross-Appellants,

v.

SUMMIT VIEW CLINIC, a Washington corporation,

Appellant & Cross-Respondent.

RESPONDENT & CROSS-APPELLANT'S REVISED REPLY BRIEF

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I. INTRODUCTION

The Flyte family submits this reply to the Summit View Clinic's last brief submitted related to this appeal. As to the purported "offset" of $3.35 million, the Clinic's lawyers have all but conceded the issue was erroneously argued at the trial court level. Specifically, on appeal, the Clinic's lawyers decided to simply pretend like the controlling law from the Supreme Court and Court of Appeals, *Washburn* and *Waite*, does not exist.[1] The Flyte family's entire appellate brief relied upon these controlling legal authorities, *Washburn* and *Waite*, and highlighted that the Clinic's lawyers had, effectively, lied to Judge Culpepper about the state of the law by omitting any discussion of this case law. As seasoned practitioners, the Clinic's lawyers believed that they could fool a busy trial court judge (and they did) but are now wise enough to know that this appellate body has the time to read and understand that state of existing law. More importantly, the Clinic's lawyers failed to inform the trial Court and this Court, that it had, in the face of summary judgment, dismissed the affirmative defense of "apportionment" prior to trial. Realizing it could not apportion fault at the second trial, the Clinic's

[1] To be clear, the Clinic's brief wholly fails to cite or discuss these controlling legal authorities. Reference to *Washburn* or *Waite* is not even included in the Clinic's Table of Authorities. Quite egregiously, the Clinic's lawyers had the gall to lie directly to Judge Culpepper but did not have the guts take the law head on during this appeal.

lawyers fabricated a new theory that it could just simply "offset" any and all money received by the Flyte family from other entities who were at fault for wholly different injuries and claims.

As noted in the Flyte family's opening brief, the Clinic's lawyers have not engaged in zealous advocacy -- they overtly fabricated the state of existing law in order to gain a short sighted advantage at the trial court level. This less than honest manner of argument permeates the Clinic's entire appeal. Strategically, the Clinic is well aware that the other appellate arguments that were raised are thin and do not warrant a new trial. Through this appeal, the Clinic attempts to convince this Court that, based cumulatively on the weak arguments that were raised by the Clinic in conjunction with the fabricated "offset" issue, this Court should grant a new trial wherein the Clinic can properly attempt to apportion fault under RCW 4.22.070. As is demonstrated herein, the Clinic's plea for a new trial are completely and totally lacking in merit and credibility. Any error related to the fabricated "offset" was invited by the Clinic and does not warrant a new trial. Elizabeth Leedom's representations have been, for the most part, patently dishonest. The entire judgment of $16,700,000 was properly awarded and should be instated.

II. BACKGROUND

The verdict of $16,700,000 was properly awarded based upon the entirety of the evidence at trial. On appeal, the Clinic attempts to convince this Court that a new trial should be granted based upon the "offset" issues in conjunction with the other alleged errors at the trial court level. The only trial anomalies relate to (1) the jurors identifying a cold and flu poster in the deliberation room and (2) the procedural posture of this case after the Flyte family voluntarily non-suited the standard of care claims. It should be noted that because the Clinic managed to fool Judge Culpepper into believing that there was some sort of "offset" available under RCW Chapter 4.22, the Flyte family was compelled to take even greater risks at trial to account for the possibility of a $3.5 million offset. Viewed in context to the entirety of the proceedings, the full judgment of $16,700,000 should be properly instated and the Clinic should not be permitted to have an entirely new trial on "apportionment" when that affirmative defense was dismissed in the face of summary judgment years ago.

In the days leading up to the trial, Ms. Leedom and Ms. Crisera convinced Judge Culpepper to rule in the Clinic's favor on the offset issue. The trial began on October 7, 2015 and a jury was not picked until the morning of Thursday October 8, 2015. The parties gave opening

statements in the afternoon on Thursday, October 8, 2015 and then the jurors were discharged for the weekend. The first day of testimony was Monday, October 12, 2015.

Toward the end of the trial, on October 22, 2015, the parties re-addressed the issues pertaining to the "offset", the proposed verdict form, and the jury instructions. Counsel for the Flyte family noted "*Before I came in Mr. Connelly and I were just talking about this and we were just talking about how, you know, practitioners in this field know that there's been no offset for about three decades in the state of Washington, so I'm inviting the defense -- I guess I'm moving that the defense come forward with a legal citation that shows how you calculate an offset, because if that's truly the law of Washington, this isn't the first time this has come up, and it's not the law of Washington.*"[2] During that interaction, Judge Culpepper noted that "*it seems to me that certainly there is no offset for whatever portion of that was for the wrongful death of Abbigail. This is off of my head.*"[3] The exchange continued with Ms. Leedom fortifying the legal fiction at issue:

> MS. LEEDOM: I should get an offset for a claim they elected not to pursue, Your Honor, absolutely. I should get an offset for a claim they elected not to pursue. They could

[2] VRP 1802
[3] *Id.*

> have brought this claim into court and they elected not to do so.[4]

Ms. Leedom and Ms. Crisera continued to perpetuate the legal charade in relation to the offset even though there was still time to correct the issue.[5]

The parties discussed the impact of Ms. Leedom's "offset" upon the proceedings.[6] The undersigned attorneys noted that Judge Culpepper's ruling upon the issue required the Flyte family to ask for more money from the jury:

> MR. BEAUREGARD: Well, Your Honor, normally I would agree, but the standard for Rule 11, and I'm going to brief it very well, it's been exceeded here. This was a fabricated legal premise. Ms. Leedom is making it up as she goes along. She's telling this Court now what we all know is common sense: Well, you know, now I get credit for Abbigail's claim because they didn't -- everybody knows that's not the law. I mean, come up with a legal citation if they didn't just make it up. Come up with a legal citation.
>
> So, here, I'm only prejudiced for one reason, because on the off chance that somehow jurisprudence is going to turn on its head after 30 years, consistent with what the ruling has been, then I have to make a judgment to ask for way more money than I would otherwise do just to accommodate for this. Right now I intend to ask the jury for $3 million, so I don't know -- do we give St. Joe's back a check for $500,000 or does the Summit View Clinic get $500,000 for failing to prevent the deaths here, or how does that work?[7]

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[4] VRP 1806
[5] *Id.*
[6] *Id.*
[7] VRP 1807

The legal charade continued with Ms. Leedom "waiving" the right to pursue the Flyte family for the balance if the jury's verdict came back below $3.5 million:

> THE COURT: Well, my understanding is Summit View, through their attorneys, off the record yesterday said you were waiving any claim for any check for offset.
>
> MS. LEEDOM: From anybody, that's correct.
>
> THE COURT: So why don't you say that on the record?
>
> MS. LEEDOM: I would be happy to say that, Your Honor. We are not intending to seek, and if there would be such a claim, we would waive any claim against the estate, Kenny Flyte, St. Joe's, Good Samaritan.
>
> THE COURT: Jacob Flyte?
>
> MS. LEEDOM: Jacob Flyte. This isn't an affirmative attempt to get money from somebody; it is merely an offset. A couple of points, Your Honor. Mr. Flyte is the executor of all estates, so he has the authority to waive any or all of the claims and to allocate any or all of the claims. I would note that in the last trial Mr. -- I guess it was Ms. Kays who did the closing argument on damages, asked the jury for $27 million. So to say that he's somehow concerned by this because of this offset ruling, I think, is perhaps a bit disingenuous.
>
> THE COURT: Well, he kind of asked for some guidance, I guess, yesterday. The only guidance I can offer right at this point -- again, this is after a whole hour or less thinking about it -- is that the portion, if we determine what it is, of the settlement attributable to the wrongful death claims to Abbigail would not be offset. Again, Mr. Beauregard says there's no offset whatsoever ever; I would change the law in Washington, so I'll have to look at that.

> MR. BEAUREGARD: Right. And, again, Your Honor, like I say, I'll be filing a motion – they can respond to it -- that will come up and show that they fabricated this legal premise. I'm using the word "fabricated" because it is actually unethical what they've done here. They've led this Court into a $3.5 million ruling and they aren't going to be able to cite any law for it. That's pretty egregious.
>
> And, again, like I said, I wrote a short brief at the beginning of this case because, as practitioners in the field know, you don't even make that argument. I was embarrassed for them for making that argument. So that we can deal with it later, I'd like to have some guidance.[8]

Thereafter, the Flyte family was forced to pursue the case with the belief that any verdict would be reduced by $3.5 million and any deficiency might have to be paid to the Summit View Clinic.

Probably based out of the authenticity of the Flyte family's presentation, the jury decided the award fair and just compensation. In this regard, the Clinic's lawyers have failed to articulate a compelling basis upon which to rip this symbolic judgment away from the Flyte family too so that the Clinic can shift positions and attempt to revive a dismissed affirmative defense of "allocation" during a third trial. The jury's decision must stand. The full judgment of $16,700,000, with no offset, should be fully instated.

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[8] VRP 1807-9

III. ARGUMENT RE: THE FABRICATED OFFSET

At the trial court level, the Clinic's lawyers, specifically Jennifer Crisera and Elizabeth Leedom, misled Judge Culpepper into believing that existing case law supported an offset of the $3.5 million settlement with St. Joe's Hospital.[9] In so doing, Ms. Crisera and Ms. Leedom violated the duty of candor by failing to apprise Judge Culpepper of the controlling authorities, namely *Washburn v. Beatt Equipment Co.*, 120 Wash. 2d 246, 840 P.2d 860 (1992) and *Waite v. Morisette*, 68 Wash. App. 521, 843 P.2d 1121 (1993).[10] *See* RPC 3.3(a)(3) (A lawyer shall not knowingly…fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client…")[11] In *Washburn*, the Supreme Court unequivocally held that offsets are not available as argued by the Clinic. In *Waite*, the Court of Appeals fortified the Supreme Court's holding in *Washburn*. No subsequent cases have overturned these controlling precedents or

[9] VRP of October 2, 2015, Pages 20-31
[10] *Id.*

[11] The court, in determining whether to award Rule 11 sanctions, applies an objective standard to determine whether a reasonable attorney in like circumstances could believe his actions to be factually and legally justified. *Eller v. East Sprague Motors & R.V.'s, Inc.*, 159 Wash. App. 180, 244 P.3d 447 (2010). In addition to the relationship to the contradictory Bennet Bigelow desk book on medical malpractice, Ms. Leedom teaches Medical Malpractice Law at the University of Washington Law School. The undersigned counsel took the class as a student in 2001, from a different professor, and the school does not teach what Ms. Leedom claims to be the law.

otherwise interpreted the applicable statutory scheme set forth under RCW Chapter 4.22. *et seq.*[12]

In truth, since the enactment of the Tort Reform Act of 1986, the "offset" of verdicts has not been the law of Washington, as confirmed in 1993 by the *Waite* Court:

> Where proportionate liability applies, as here, a defendant can never be liable for more than his percentage share, because recovery is limited to his proportionate share of the total damages. The reasons for allowing credits where the liability is joint and several are not present where liability is proportionate:
>
> In a jurisdiction with pure several liability, a non-settling defendant should not receive a credit. Credits address two concerns. They reimburse a non-settling defendant for an extinguished contribution claim. They also prevent a claimant from securing more than one full recovery.
>
> (Footnotes omitted.) Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint & Several Liability,* 22 Gon.L.Rev. 67, 76 (1986–87). Because a nonsettling defendant cannot be held liable for more than his proportionate share, no credit is needed to prevent a defendant from bearing an unfair burden of more than its share. Similarly, no credit is needed to prevent the claimant from securing more than full recovery, because even in the best of circumstances, if the claimant recovers from all the defendants he will recover no more than 100 percent.[2] As the court in *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 431 (Tex.1984) stated:

[12] On appeal, the Clinic offers a near incomprehensible argument suggesting that *Adcox v. Children's Orthopedic Hospital* somehow supports the Clinic's position. The Clinic's interpretation of *Adcox* is so strained and unintelligible, particularly in light of *Washburn* and *Waite*, that a response to the Clinic's arguments is hardly even possible. *Adcox* did not overrule *Washburn*.

The reasoning behind the one recovery rule no longer applies.... Because each defendant's share can now be determined, it logically follows that each may settle just that portion of the plaintiff's suit. The settlement does not affect the amount of harm caused by the remaining defendants and likewise should not affect their liability.

Duncan, at 431.

Other courts have followed this reasoning. In *Charles v. Giant Eagle Markets,* 513 Pa. 474, 522 A.2d 1 (1987), the court ruled that settlement moneys paid by a tortfeasor in excess of its proportionate share of damages as determined by jury, did not relieve a nonsettling tortfeasor of its obligation to pay a full, pro rata share. The court recited the policy reasons for supporting settlements, and stated that:

The inducements for a defendant to settle are the certainty of the agreed-upon obligation and the avoidance of the vagaries of trial.... Any subsequent trial against the remaining defendants should not disturb the resolution reached between the plaintiff and the settling tortfeasor. It would be an equal disservice to a supportive settlement policy to provide a windfall to a non-settling tortfeasor where the settlement proves to be more generous than the subsequent verdict....

....

[It is a] fallacy that the jury's verdict represents a measurement of damages superior to that agreed upon by the settling parties....

Charles, at 477–78, 522 A.2d 1. In light of the strong policy reasons for supporting settlements, one court pointed out the danger that if the rule were contrary, settlements would be less likely:

If the plaintiff knew that any settlement reached would be deducted from the proportionate share owed to the plaintiff by another tortfeasor, the plaintiff would be less likely to settle. Similarly, tortfeasors might refuse to settle, hoping

> that their just share of damages would be reduced by the settlement amount paid by another tortfeasor.
>
> *Kussman v. City & Cy. of Denver,* 706 P.2d 776, 782 (Colo.1985).
>
> Finally, there is the question of symmetry. If a claimant settles "low" in light of the eventual decision at trial, the claimant bears that consequence. "[S]ymmetry requires that if the disadvantage of settlement is [the claimant's,] so ought the advantage be." *Roland v. Bernstein,* 171 Ariz. 96, 828 P.2d 1237, 1239 (1991). As the *Roland* court pointed out, it would be anomalous to give the benefit of an advantageous settlement to the nonsettling tortfeasor rather than to the plaintiff who negotiated it.
>
> Here, the trial court's ruling erroneously provided Northwest Propane with a windfall simply because Waite happened to secure a settlement with Whatcom County that turned out to be generous in light of the jury's decision.
>
> The trial court's determination that Waite was the prevailing party for the purposes of costs is correct in light of the above analysis.
>
> The trial court judgment is reversed, and the case is remanded to the trial court with instructions to enter judgment for the plaintiff for the full amount of the verdict against Northwest Propane.

Waite, 68 Wash. App. 521. This law is widely understood by personal injury practitioners in the State of Washington as documented since 1986 in the local law reviews. *See* Harris, *Washington's 1986 Tort Reform Act: Partial Tort Settlements After the Demise of Joint & Several Liability,* 22 Gon.L.Rev. 67, 76 (1986–87).

On appeal, now faced with the careful eyes of this appellate body, Ms. Crisera and Ms. Leedom are no longer so bold as to again fabricate the state of existing precedent. Instead, as this Court can see, the Clinic simply never discussed, distinguishes, or even cites to *Washburn* or *Waite* in the responsive legal brief.[13] Further, as a preservation of the record issue, the Clinic's lawyers offered no explanation for wholly failing to submit a copy of the settlement with St. Joe's Hospital for appellate review.[14] Moreover, the record is completely devoid of any indication that a proper reasonableness hearing ever actually occurred, because it didn't.[15] It must be also noted that prior to the first trial, in the face of summary judgment, the Clinic actually stipulated in writing to striking the allocation defense:

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[13] Under the threat of CR 11 sanctions, it appears as though the assigned and very ethical appellate lawyers, Howard Goodfriend, Catherine Smith, and Victoria Ainsworth, refused to sign an appellate brief adopting Ms. Crisera and Ms. Leedom's false representations.

[14] *Id* at Pages 25-26

[15] The Clinic cites to Judge Culpepper's ruling under Clerk's Papers CRP 405-6 and proof of a purported reasonableness hearing that allegedly occurred before Judge Martin. The moving papers from the proceedings before Judge Martin were never submitted by the Clinic. And if those records had been submitted, they would demonstrate that there was simply an approval of the minor settlement under SPW 98.16W, but no reasonableness hearing whatsoever under RCW 4.22.060. Again, the Clinic is fabricating the record.

Further, the parties as mentioned above stipulate to the following facts pursuant to defendant Summit View Clinic's First Affirmative Defense of non-party fault and apportionment:

> 1) Summit View Clinic will not be presenting Good Samaritan Hospital or its agents as a non-party at-fault party or requesting apportionment of fault to Good Samaritan Hospital or its agents, for the care (or lack of care) of Kathryn Flyte and/or Abbigail Flyte received on June 29, 2009 through their discharge.
>
> 16

At no point was this stipulation ever unraveled or did Summit View advise the Court it could not apportion fault.[17]

The Clinic's lawyers' invitation of this error could not be clearer. Repeatedly, at the trial court level, Ms. Crisera and Ms. Leedom asserted, though untrue, that the Clinic could simply "choose" to take an "offset" of the judgment.[18] At no point in time has Ms. Crisera or Ms. Leedom explained how what occurred before Judge Culpepper comports with principles of due process and/or even the existing statutory scheme under RCW Chapter 4.22 or the interpretive case law. As illustrated in *Washburn* and again in *Waite*, the proper remedy is entry of the jury's full and proper verdict. The law does not support allowing the Clinic to conduct a third trial on the merits to remedy the legal misadventures that were deliberately undertaken by Ms. Crisera and Ms. Leedom. In accord

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[16] CP 301-8
[17] *Id.*
[18] VRP of October 2, 2015, Pages 20-31

with *Washburn* and *Waite*, this Court should reinstate the full and proper judgment against the Clinic of $16,700,000.

IV. CONCLUSION

The jury's verdict of $16,700,000 was achieved after a full and fair trial on the merits and should not be subject to any form of offset. The Clinic's lawyers were caught flat-footed in that they won the first trial and believed that the second trial would be a cake walk. They were incorrect. The Flyte family enhanced their vision of what was important in this lawsuit and decided that less was more. In that regard, the Flyte family voluntarily jettisoned the distracting standard of care claims and issues pertaining to the premature death of Abbigail Flyte and focused the entire case upon what it should have been about the first time: informed consent. Additionally, the Flyte family also voluntarily dropped millions of dollars worth of medical bills and future wage loss claims premised upon the belief that a jury would see this case for what it is: the tragic and preventable loss of a mother and baby girl. Kenny Flyte solely cared about obtaining some form of accountability and properly obtained the verdict of $16,700,000. Everyone on the Flyte family's side of the case was petrified at the probable notion of losing this lawsuit for the second time. On this sound record, the jury's verdict should and must stand.

DATED this 10th day of October, 2016.

Respectfully submitted

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

KENNETH FLYTE, P.R., *et al.* Appellants, v. SUMMIT VIEW CLINIC, a Washington Corporation, Respondent.	No. 48278-9-II CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the state of Washington, that she is now, and at all times materials hereto, a citizen of the United States, a resident of the state of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the following:

- RESPONDENT & CROSS-APPELLANT'S REVISED REPLY BRIEF

I caused to be served this date the foregoing in the manner indicated to the parties listed below:

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